

*United States Court of Appeals
for the Second Circuit*



APPENDIX

ORIGINAL
WITH PROOF
OF SERVICE

74-1176

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

B

P/S

UNITED STATES OF AMERICA,

Appellee,

-against-

HOWARD FUCHS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT & COMMITMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

APPENDIX

HENRY B. ROTHBLATT
Attorney for Defendant-Appellant
232 West End Avenue
New York, New York 10023

EDWARD J. BOYD V
U.S. Attorney
Attorney for Appellee
225 Cadman Plaza East
Brooklyn, New York 11201

(4076A)



PAGINATION AS IN ORIGINAL COPY

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BAISLER

CRIMINAL PCKET

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.: D. DePetris for deft. FUCHS:
HENRY PANTOJA, HOWARD FUCHS, JUAN GONZALEZ, MICHAEL ARLEN, EDWARD COHEN and CARLOS TRESPALACIOS	Henry Rothblatt 232 West End Avenue, NYC. 78797001
	for deft. TRESPALACIOS: Melvyn Solomon 11 Park Place NYC. 666-9500
	For Defendant: EDWARD COHEN 299 Broadway N.Y., N.Y. 10007
	233-3330 for deft. PANTOJA: Martin Schmukler 299 Bdway, NYC. 349-5554
Did import into the U.S. cocaine	

DATE	PROCEEDINGS
11-20-73	Before COSTANTINO, J. - Indictment filed- Bench warrant ordered for defts Cohen, Fuchs and Gonzalez and issued
11/23/73	Before COSTANTINO, J. - Case called- Deft and atty present-Deft arraigned and enters a plea of not guilty-Bail set at \$25,000.00 P.R. Bond- Bail limits set to S.D.N.Y. and New Jersey.
11/23/73	Notice of Appearance filed.
11-26-73	Petition for Writ of Habeas Corpus Ad Prosequendum filed. (FUCHS)
1-26-73	By COSTANTINO J - Writ Issued, ret. Nov. 27, 1973. (FUCHS)
1-27-73	Notice of Appearance filed (deft. PANTOJA)
1-27-73	Notice of Appearance filed (deft. ENTRESPALACIOS)
1-27-73	Notice of Appearance filed (deft FUCHS)
	(Open)

DATE	PROCEEDINGS
11-27-73	Before MISHLER, CH J - Case called - defts FUCHS & TRESPALACIOS present with counsels - deft TRESPALACIOS arraigned and enters a plea of not guilty - bail set at \$25,000 surety bond or personal appearance bond secured by deed from defts brothers' house. Deft FUCHS arraigned and entered a plea of not guilty - bail set at \$100,000 surety company bond -defts. PANTOJA L & GONZALEZ not present - counsel for deft PANTOJA present - Bench Warrant ordered for deft PANTOJA and stayed until Nov. 27, 1973. Dec. 10, 1973 at 9:45 am to fix new trial date. (proposed date for trial 1-7-74)
11-29-73	Before MISHLER, CH J -case called - deft ARLEN & counsel Ronald Margulis present - deft arraigned and enters a plea of not guilty - bail set at \$25,000 P/R Bond - trial set down for Jan. 7, 1974.
11-29-73	Bench Warrant Issued for deft PANTOJA.
11-30-73	Notice of motion for a bill of particulars and discovery and inspection filed (forwarded to Judge Mishler to set date) (Edward Cohen)
12-10-73	Petition for writ of Habeas Corpus ad Prosequendum filed (FUCHS)
12-17-73	By MISHLER, CH.J.- Writ issued ret. 12-10-73 (FUCHS)
12-10-73	Before MISHLER, CH J - Case called - Jan. 7, 1974 for trial.
12-10-73	Before MISHLER, CH J - Case called - motion for Bill of Particulars adjd to Dec. 21, 1973 (FUCHS & COHEN)
12-10-73	Notice of Motion filed for Discovery, ret. Dec. 21, 1973. (EDWARD FUCHS & PANTOJA)
12-10-73	Letter to A.U.S.A. D. DePetris from Stephan Peskin filed re: listing in needed to prepare for case(FUCHS) (letter dated 12-7-73)
12-11-73	By MISHLER, CH.J.- Certificate of Engagement filed- That the undersigned hereby certifies that the following lawyers representing the following are required to appear in this court to proceed to trial in the above entitled case on 1-7-74 at 10:00 A.M.--Martin Schmukler, esq.(counsel for deft Pantoja)- Henry Rothblatt, esq(counsel for deft Fuchs)- Irving Cohen (counsel for deft Cohen)- Melvin Solomon, esq.(counsel for deft Trespalacios)- Ronald Margolis, esq(counsel for deft Arlen)
12-11-73	Writs, ret'd and filed - Executed (FUCHS&FUCHS)
12-13-73	Notice of Motion filed, ret. Dec. 21, 1973, as to deft PANTOJA, for a declaration of forfeiture of the bail bond etc.
12-17-73	Letter dated 12/17/73 filed from P. Grishman to Ch. J. Mishler.
12-17-73	Letter dated 12/19/73 filed from M. Schmukler to Dr. Luis A. Donado.
12-17-73	Letter dated 12/18/73 filed from L.A. Donado to Dave DePetris.
12-17-73	Letter dated 12/10/73 filed from Ch. J. Mishler to Mr. G.

DOCKET ENTRIES

PROCEEDINGS

Before MISHLER, CH J - Case called - defts FUCHS & TRESPALACIOS present with counsels - Trial resumed - deft FUCHS rests - Motion by both defts for Judgment of Acquittal is denied - At 1:07 PM the jury retired for deliberation - at 3:30 PM the Jury returned and rendered a verdict of guilty as to deft FUCHS & not guilty as to deft TRESPALACIOS-Jury polled - Jury discharged - deft TRESPALACIOS discharged - sentence adjd without date as to deft FUCHS. Trial concluded.

By MISHLER, CH J - Judgment of Acquittal filed (TRESPALACIOS)

By MISHLER, CH J - Order of Sustenance filed (lunch -16 persons)

7 Volumes of Stenographers transcripts filed (pgs 1 toll162)

Stenographers transcript dated Dec. 21, 1973 filed. (Howard Fuchs)

Notice of Motion filed for setting aside the verdict of guilty as to deft FUCHS and for Judgment of Acquittal etc. (date to be set by Mishler, ChJ)

By MISHLER, CH J - Order filed that judgment be entered in favor of the U.S.A. and against Hemel Pantoja and Dr. Luis Arraut Donado, for the sum of \$150,000 including the cash deposit of \$15,000 and execution may issue thereon against the property of said Hemel Pantoja and Dr. Luis Arraut Donado. It is FURTHER ORDERED that the Clerk of the Court be directed to pay out of the Registry of this Court the sum of \$15,000 to the Treasurer of the U.S. in partial satisfaction of said judgment.

Voucher for Expert Services filed (Trespalacios-Trial Minutes)

Order filed that judgment be entered in favor of the U.S.A. and against Hemel Pantoja and Dr. Luis Arraut Donado for the sum of \$150,000 including the cash deposit of \$15,000 and execution may issue thereon against the property of the said Hemel Pantoja and Dr. Luis Arraut Donado and it is further ORDERED & ADJUDGED that the Clerk of the Court be and hereby is directed to pay out of the registry of this Court the sum of \$15,000 to the Treasurer of the U.S. in partial satisfaction of said judgment.

By MISHLER, CH.J.- Memorandum of Decision filed that the motion to vacate the verdict and dismiss the indictment will be held on 2-1-74 at 11:00 A.M. The court will conduct a hearing on any claim of the violation of deft's right to due process of law, including the claim set forth in the motion (HOWARD FUCHS)

Stenographers transcript filed dated Jan. 14, 1974 (pgs 1163 to 1292)

Deft's Memorandum for sentence filed (FUCHS)

DATE	PROCEEDINGS
12/21/73	Before MISHLER, CH.J.- Case called-Deft Pantoja and counsel not present-Motion granted (bail forfeiture)-Govt to prepare judgment for forfeiture of bail as to deft Pantoja
12/21/73	Before MISHLER, CH.J.- Case called- Motion argued- Motion granted (Bill of Particulars) for both of Particulars-Motion for reduction of bail is denied as to deft FUCHS.
12/27/73	Petition for Writ of Habeas Corpus Ad Prosequendum filed (H.FUCHS)
12/27/73	By MISHLER, CH.J.- Writ issued, ret. 12/28/73
12-28-73	By MISHLER, CH.J.- Order filed that the bail bond of the deft Pantoja in the amount of \$150,000 filed by the deft and co-signed by Dr. Luis Arraut Donado, surety, be and is hereby declared forfeited (HEMEL PANTOJA)
1-3-73	Writ retd and filed - executed (Howard Fuchs)
1-7-74	Deft CARLOS TRESPALACIOS requests on Voir Dire filed.
1-7-74	Before MISHLER, CH J - Case called - defts FUCHS, ARLEN, COHEN & TRESPALACIOS present with counsels - defts PANTOJA & GONZALEZ not present - (fugitives) defts ARLEN & COHEN withdraw their pleas of not guilty and after being advised of their rights by the court and each on his own behalf enter a plea of guilty as charged. On motion of Asst US Atty David De Petris defts ARLEN & COHEN are severed from the trial - Trial ordered and begun as to the other defts. (FUCHS & TRESPALACIOS) Jurors selected and sworn - Taint hearing held - Govts. Ex. 7-A to be sealed after trial for possible review by the Court of Appeals - trial contd to Jan. 8, 1974 - hearing continued to 1-8-74.
1-8-74	Before Mishler, CJ- Case called - defts FUCHS & TRESPALACIOS present - attys present - trial resumed - Taint Hearing concluded - Trial resumed - Trial to be continued on Jan. 9, 1974.
1-9-74	Before MISHLER, CH J - case called .. defts & counsels present - Trial resumed - Trial continued to Jan. 10, 1974.
1-10-74	Before MISHLER, CH J - Case called- Defts Fuchs and Trespalacios present with counsel- Trial resumed- Motion by deft Trespalacios for severance denied- Govt rests- Motion by both deft for judgment of acquittal is denied- Trial contd to 1-11-74 at 10:00 A.M.
1-11-74	Before MISHLER, CH J - case called - deft FUCHS & TRESPALACIOS & counsels present - trial resumed - Deft TRESPALACIOS rests - Trial continued to Jan. 14, 1974 at 9:30 am.

DOCKET ENTRIES

73 CR 1008
CRIMINAL DOCKET

INDICTMENT

EJB:DAD:lr
R. #735,025

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

HEMEL PANTOJA, HOWARD FUCHS,
JUAN GONZALEZ, MICHAEL ARLEN,
EDWARD COHEN and CARLOS
TRESPALACIOS,

INDICTMENT

Cr. No. 73 CR 1008
(T. 21, U.S.C., §841(a)(1),
§846, §952(a), §960(a)(1),
and §963)

Defendants.

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between the 2nd week of September 1972 and the 2nd week of May 1973, both dates being approximate, within the Eastern District of New York and elsewhere, the defendants HEMEL PANTOJA, HOWARD FUCHS, JUAN GONZALEZ, MICHAEL ARLEN, EDWARD COHEN and CARLOS TRESPALACIOS, together with others known and unknown to the grand jury, did knowingly and intentionally combine, conspire, confederate and agree to violate Section 841(a)(1), Section 952(a) and Section 960(a)(1) of Title 21, United States Code.

1. It was part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally import into the United States from places

INDICTMENT

outside thereof, substantial quantities of cocaine,
a Schedule II narcotic drug controlled substance.

2. It was further a part of said conspiracy
that the defendants and co-conspirators would knowingly
and intentionally distribute and possess with intent
to distribute substantial quantities of cocaine,
a Schedule II narcotic drug controlled substance.

3. It was further a part of said conspiracy that
the defendants and co-conspirators would conceal the
existence of the conspiracy and would take steps de-
signed to prevent disclosure of their activities.

(Title 21, United States Code, Section 846 and Sec-
tion 963)

A TRUE BILL

FOREMAN

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

1 Charge

2 THE COURT: Please be seated.

3 MR. SOLOMON: Your Honor, Mr. Rothblatt.

4 (The jury entered the jury box.)

5 THE COURT: Madam Foreman, ladies and
6 gentlemen of the jury, it becomes my duty at
7 this point in the trial to instruct you on the
8 applicable law. I think a good starting point
9 is to discuss the obligations of each participant
10 in a jury trial.

11 First there are the lawyers. The lawyers
12 are adversaries. They represent the clients. Be-
13 cause they represent clients they represent
14 causes. At times they are emotionally involved
15 with their clients, and so we must recognize that
16 they are partisan.

17 Of course the theory is that when lawyers
18 of comparable ability contest over a disputed
19 fact evidence will be developed for the jury to
20 see. So that the lawyers' function is to develop
21 the evidence in the trial.

22 As distinguished from the participation
23 of the lawyers, the Judge and the jury are dis-
24 passionata and objective. The jury in every jury
25 trial is the judge in every sense of the word.

1 2 Charge

2 But there the similarity ends, because the jury's
3 function and the Judge's function are entirely
4 different. The jury is the sole judge of the
5 facts. The jury and the jury alone determine what
6 happened, what happened from mid-September of 1972
7 to some time in May 1973. I'm just referring to
8 the terms set forth in the indictment as to the
9 term of the conspiracy.

10 The Judge on the other hand is the sole
11 judge of the law. That's why during the trial the
12 lawyers were obligated to accept the ruling of the
13 Court. And you two are obliged to accept the law
14 as the Court charges it.

15 Now, you may not be happy about what you've
16 learned about the laws referring or relating to
17 drugs and drug abuse. But it's not for either of
18 us to question the wisdom of the laws. The
19 Congress has seen fit to pass the legislation,
20 and we start with that.

21 You are not to inject your personal attitude
22 toward the drug laws or drug abuse in making a
23 determination of this case. I will soon read
24 some of the statutes. I'll tell you something
25 about the basis of the statutes and the reasons

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2 for them. And as I say, the Congress has en-
3 acted that, and the Drug Abuse and Control Law
4 of 1970 was a matter for Congress. And so we
5 must accept that as the law of the land.

6 I have no interest, no desire in in any
7 way affecting, interfering with your determina-
8 tion in this case. I have no opinion. I've so
9 conditioned myself to avoid any kind of opinion
10 in this case. It's none of my business.

11 My function here is to the extent that it
12 is possible, within the powers granted me and
13 within the experience I have, to see that it's
14 an even-handed trial, fair to both, fair for the
15 government, fair for the defendants.

16 In this case I told you that no one stands
17 at a different height than anyone else. Everyone
18 is treated equally, the government and the defend-
19 ants, the government lawyers and the defendants'
20 lawyers are all the same.

21 The law imposes an obligation on the govern-
22 ment, and they must carry out that obligation. As
23 I instructed you before, we talk about fair trial,
24 but we can't have a fair trial unless we have a
25 fair jury. And a fair jury means a jury that's

1 4 CHARGE

2 willing to decide the case on what it heard within
3 the four walls of this Courtroom, and in accordance
4 with the law as I charge you, a jury that's willing
5 to decide the case free of all bias, prejudice and
6 sympathy; a jury that's willing to cast aside any
7 preconceived notions that you harbor and may have
8 before you sat down as jurors in this case.

9 When I charge in this case I'll refer to
10 both defendants. I may use the singular as a
11 collective term, or I may use the plural. If I
12 intend the charge to apply solely to one defendant,
13 I'll name the defendant. So when I say defendant
14 or defendants it means both defendants.

15 The defendants are presumed to be innocent.
16 You are to judge each defendant separately. You
17 are to weigh the evidence in the case against
18 each defendant and see whether the government has
19 proved its case. The presumption of innocence
20 is a time-honored presumption in Anglo-American
21 law. It means that the defendant begins with a
22 clean slate, and you measure the admissible evidence,
23 the evidence that's admitted into this trial, to
24 determine whether that presumption is overcome.

25 The presumption means that you must at the

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2 outset of the trial conclude that both defendants
3 are innocent of the crime charged in the indict-
4 ment. Now, that presumption, that conclusion,
5 is maintained throughout the trial, and again,
6 symbolically . . . , the defendants are clothed with
7 the presumption of innocence. It continues all
8 through your deliberations, and is overcome only
9 if and when the government has proved its case
10 beyond a reasonable doubt.

11 In Scotland there are three verdicts. You
12 may have heard the term a Scotch verdict: Guilty,
13 not guilty, not proved. In this country we only
14 have two verdicts: Guilty or not guilty. Not
15 guilty includes not proved. So the test is whether
16 the government proved its case beyond a reasonable
17 doubt.

18 A reasonable doubt is a doubt which a
19 reasonable person has after weighing all the
20 evidence. Now, a reasonable doubt is not a doubt
21 for which you must give a reason. You don't have
22 to justify your verdict to anyone. A reasonable
23 doubt is a doubt based on reason and common sense
24 and experience, as distinguished from a doubt
25 based on emotion that arises from a distaste to

CHARGE

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2 perform an unpleasant task, or a doubt based upon
3 pure whim. It is not a vague, speculative or
4 imaginary doubt.

5 A reasonable doubt is the kind of doubt that
6 would make a reasonable person hesitate to act in
7 a matter of importance in his own life.

8 Proof beyond a reasonable doubt is therefore
9 proof of such a convincing character that you would
10 be willing to rely upon it unhesitatingly in the
11 most important and weighty of your own affairs.

12 Now, the government's burden is not to prove
13 its case beyond all doubt. The government's burden
14 is not to convince you beyond a reasonable doubt
15 that every bit of evidence it offered at the trial
16 is true. The burden of the government is to prove
17 every essential element of the crime charged be-
18 yond a reasonable doubt. And I'll tell you later
19 in the charge what the essential elements of the
20 crime charged are in this case.

21 Now, a reasonable doubt may arise from the
22 failure of the government to produce evidence.
23 The defendants do not have to prove their innocence.
24 The defendants are not required to offer any proof
25 at all. The defendants have a right to rely on the

1 7

2 failure of the government to prove its case.

3 Oh, now, of course it's not the number of
4 witnesses that are called, it doesn't depend on
5 who called the witnesses. We talk about the
6 quality of the evidence produced by the govern-
7 ment, the quality of the evidence in the case,
8 and based on that you determine whether the govern-
9 ment proved its case beyond a reasonable doubt.

10 Where a defendant, as in this case, has
11 offered evidence of good general reputation for
12 truth and veracity, or honesty and integrity, or
13 as a law abiding citizen, the jury should consider
14 such evidence along with all the other evidence
15 in the case.

16 Now, evidence of a defendant's reputation
17 for truth and veracity or honesty and integrity,
18 or as a law abiding citizen, or that such matters
19 have not been discussed or questioned, may be
20 sufficient to warrant an inference of good reputa-
21 tion as to those traits of character. Evidence of
22 a defendant's reputation inconsistent with those
23 traits of character ordinarily involved in the
24 commission of a crime charged may give rise to a
25 reasonable doubt, since the jury may think it

CHARGE

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improbable that a person of good character in
respect to those traits would commit such a crime.

Now, the jury will always bear in mind that
the law never imposes on a defendant in a criminal
case the burden of calling any witnesses or pro-
ducing any evidence.

Now, what is evidence? Evidence is the
method which the law uses to prove or disprove a
disputed fact. Evidence is generally divided into
two categories: One is direct evidence and the
other indirect or circumstantial.

Now, direct evidence is the testimony of
witnesses, of what those witnesses saw or heard.
Circumstantial evidence is a method by which the
jury may draw an inference based on experience and
good common sense from facts established from the
evidence.

(Continued on next page.)

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Now, the general instruction in the abstract I find is a little confusing so I like to give an example. Let's assume that you were sitting here in another type of case. Let's assume that a plaintiff, Mrs. Smith, was suing a defendant, Mr.. Jones for personal injuries. And Mrs. Smith claimed that Mr.. Jones, while driving his car, passed a stop sign without stopping, in violation of the Vehicle and Traffic Law of the State of New York. Let's assume my Courtroom Deputy, Mr. Adler and myself, were standing on the street corner where the stop sign was installed. We were talking, he facing me and at the same time facing the roadway and the stop sign, I with my back to the stop sign, nothaving the stop sign in view.

Now, if he were called to testify on that disputed fact -- the defendant says, "No, I did not pass the stop sign without stopping, I stopped first;" The plaintiff is Mrs. Smith saying, "Oh, you passed that stop sign without stopping" -- Mr. Adler might say, "Well, on the particular day" there were a lot of preliminary questions setting the scene --

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2 "I was talking to the Judge, the stop sign.
3 was in view, I saw Mr. Jones driving his
4 1973 white Cadillac at 65 miles an hour, he
5 continued at 65 miles an hour and passed that
6 sign without stopping."

7 Now, that's direct evidence of that
8 disputed fact.

9 Well, if I were called as a witness, I
10 couldn't testify with direct evidence as to
11 that disputed fact, but I might testify that
12 while I was talking to Mr. Adler through the
13 corner of my eye, within my peripheral vision
14 came a 1973 Cadillac driving about 65 miles an
15 hour, it passed behind me, took about two or
16 three seconds and it traversed about 150 feet
17 and I turned to my left and there I saw the
18 same Cadillac travelling at the same speed
19 and struck and knocked down the plaintiff,
20 Mrs. Jones.

21 Now there is proof from which the Jury
22 might reasonably infer that that motor vehicle
23 passed the sign without stopping. The estab-
24 lished facts: The motor vehicle travelling
25 at 65 miles an hour, two or three seconds

1 later, 150 feet later, travelling at the same
2 speed; well, good, common sense, experience dictates tha
3 the car stopped at the stop sign and could not have traveled
4 that 150 feet in two or three seconds. So
5 the inference that the jury might reasonably
6 make is that car passed the stop sign without
7 stopping.

8 So on the one hand, you have direct
9 testimony to prove a fact. On the other hand
10 you have circumstantial evidence to prove a
11 fact. The law does not hold that one type of
12 evidence is of better quality than the other.
13 The law only provides that on both the direct
14 and indirect or circumstantial evidence the
15 Government must prove its case beyond a
16 reasonable doubt.

17 Now, I have used the term presumption, I
18 have used the term inference. A presumption is
19 a conclusion which the law requires the jury
20 to make, and remains and prevails unless over-
21 come by proof to the contrary beyond a
22 reasonable doubt. And the example is the
23 presumption of innocence.

24 An inference, on the other hand, is a
25 conclusion which the Jury may make. And the

example of that, of course, is the method by
which the Jury may prove a disputed fact through
circumstantial evidence.

Now, what is evidence in the case? First,
it's the sworn testimony of the witnesses that
appeared before you. I understand there are no
exhibits marked in evidence, so I will have
to eliminate that statement from my charge.

I don't know whether there were facts that
were stipulated in this case. No? Both sides
agree no facts? So the evidence in this case
is the testimony of all the witnesses. I
point out to you what is not evidence so you
may clearly understand what is evidence. The
statements made by counsel in their openings
and summations are not evidence. They serve
very useful purposes. On the one hand the
opening pointed out to you the position of
both parties, the Government told you how it
intended to prove its case, so that when the
testimony came in it was easier to follow.
Summations, on the other hand, argues the
evidence. The defendants argue exculpability,
which means non-guilt on behalf of the defendant,

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Charge of the Court

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2 and the Government argued inculpability, which
3 meant guilt.. Now, these arguments are
4 very helpful in directing you to the truth,
5 for in fact your duty and function as jurors
6 is a search for the truth. You determine
7 what happened.

8 Any statements that I may have made of
9 course are not evidence. Any statements the
10 lawyers might have made, any random statement you
11 might have heard during the trial, are not
12 evidence. Evidence stricken from the record --
13 when I said "Strike it from the record, dis-
14 regard it," you should consider it as if it
15 were never said. Never in the record.

16 At times objections were sustained to
17 questions, and you may not speculate on what the
18 answer may have been if the Court permitted the
19 witness to answer.

20 The idea again being that if it's
21 not in the record you may not consider it.

22 Now, you the Jurors, are the sole
23 judges of the credibility of the witnesses,
24 which means the believability of their testimony
25 and the weight that testimony deserves.

Scrutinize the testimony given and the circumstances under which each witness testified and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, the witness's motive and state of mind, the demeanor and manner in which the witness answered questions while on the witness stand, the witness's own ability to observe the matters as to which he has testified, whether he shall have impressed you as having an accurate recollection of those matters, the relation each witness might bear to either side of the case, the manner in which each witness might be affected by the verdict, the extent to which, if any, each witness is either supported or contradicted by his own testimony or other testimony.

Now, a witness may be discredited or impeached or contradicted by evidence that at some other time, prior to the time the witness took the stand, he said or did something which is inconsistent with the witness's testimony before you, or by evidence that the general reputation of the witness for truth

and veracity is bad in the community. If you believe the witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown to have knowingly testified falsely concerning any material matter, you have a right to disregard that witness's testimony entirely, or on the other hand, you may, if you see fit, accept the portion of that witness's testimony that you recognize as being believable.

In this case neither defendant has testified. The law does not compel a defendant in a criminal case to take the witness stand and testify. No presumption of guilt may be raised, and no unfavorable inference of any kind may be drawn in the failure of a defendant to testify.

As previously charged, he may rely on the failure of the Government to prove its case. And it would be improper for you to discuss the failure of a defendant to take

1 the witness stand.

2
3 The witnesses Michael Arlen, Edward
4 Cohn and Carol Richner stated to you under oath
5 that they participated in the crime. Now, you
6 may not from their admission of participation
7 infer or draw any unfavorable inferences against either
8 of these defendants. But having said that they
9 participated in the crime, they are characterized
10 as an accomplice. An accomplice is one who
11 unites with another person in the commission of
12 a crime voluntarily and with common intent.
13 An accomplice does not become incompetent as
14 a witness because of participation in the
15 crime charged. On the contrary, the testimony
16 of an accomplice alone, if believed by you to
17 be true beyond a reasonable doubt, may be
18 of sufficient weight to sustain a verdict of
19 guilty, even though not corroborated or
20 supported by other evidence.

21 However, the Jury should keep in mind
22 that such testimony is always to be received
23 with caution and weighed with great care.
24 You should never convict a defendant upon the
25 unsupported testimony of an alleged accomplice

unless you believe such unsupported testimony
to be true beyond a reasonable doubt.

The testimony of a witness may be dis-
credited or impeached by showing that the witness
has been convicted of a felony -- that is of
a crime punishable by a prison term of more than
one year. But the prior conviction does not
render a witness incompetent to testify. It is
merely a circumstance which you may consider
in determining the credibility of the witness.
It is the province of the jury to determine
the weight to be given to any prior conviction
as impeaching testimony.

Now, the defendants pointed out an
inconsistency in a prior statement made by,
I believe, Michael Arlen -- Now, I don't recall
it but I think Mr. Rothblatt referred to it in
his summation, where in a statement given to
Mr. Michael Levine the statement said
Mr. Fuchs went to Patterson -- I'm just giving
you a general idea of what the statement said.

Now, of course, you recall -- if I
recall correctly -- that Mr. Arlen said he
never said that to Mr. Levine. Mr. Levine

even said that it was an error in the transcription.

Well, let's assume for these purposes that you choose to disbelieve both Mr. Arlen and Mr. Levine in that respect and that you believe that Mr. Arlen did tell Mr. Levine that Mr. Fuchs went to Patterson to pick up narcotics. It's solely up to the jury to determine whether that statement is inconsistent with the testimony he gave before you. And in weighing the degree of credibility and how it affects the testimony he gave before you, you determine whether it's material as -- whether it's inconsistent as to a material matter or an immaterial matter. And you determine how it effects Mr. Arlen's credibility .

Now, whether a prior statement is inconsistent is a fact question solely for your determination. You also determine whether the failure of the witness to reveal information prior to his testifying before you was inconsistent with the testimony he gave before you, and you determine again whether it's as to a material fact, and you determine the effect

1 it has on that witness's credibility.

2
3 Now, the Government through Mr. Michael
4 Levine, testified to certain statements made
5 by the defendant Trespalacios. As I recall it,
6 it referred to introducing Arlen to Pantoja,
7 as I recall it again -- your recollection is
8 what counts, my recollection is no better than
9 yours, and I venture to say that it's
10 probably less accurate than at least half of
11 yours. I don't have a good memory, I just
12 have a fair memory. So don't count on what
13 I say about the evidence as being the truth.

14 As I recall it in one instance
15 he said that he did not introduce Mr. Arlen
16 to Mr. Pantoja, and then later he did say
17 that he admitted, or that he introduced Arlen
18 to Pantoja, but he didn't know what the purpose
19 was, or he denied that it was for the purpose
20 of introducing him in some -- as partners in
21 a narcotics business.

22 (Continued on the next page.)

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Charge of the Court

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THE COURT (Cont.): Well, evidence relating
3 to any statement or admission, and any exculpatory
4 statement -- that means a statement tending to
5 show non-guilt, saying, "I had nothing to do with
6 it." -- made outside of Court after a crime has
7 been committed should always be considered with
8 caution and weighed with great care, and all such
9 evidence should be disregarded entirely unless the
10 evidence in the case convinces the jury beyond a
11 reasonable doubt that the statement was knowingly
12 made.

13 A statement is knowingly made when the party
14 making it is aware of what he is saying and not a
15 statement made through pure ignorance or mistake
16 or accident.

17 In determining whether a statement is an
18 admission, which is inculpable, or a statement
19 that is exculpable, claimed to have been made by
20 a defendant -- in this case it refers only to the
21 defendant Trespalacios -- out of Court, and after
22 a crime has been committed, should be considered
23 by the jury very carefully; consider the age, sex,
24 training, education, occupation and physical and
25 mental condition of the defendant, and his treatment

1 2 Charge of the Court

2 while in custody or under interrogation, as shown
3 by the evidence in the case, and also all other
4 circumstances in evidence surrounding the making
5 of the statement, including whether, before the
6 statement was made, the defendant knew or had been
7 told and understood that he was not obligated or
8 required to make the statement alleged to have
9 been made by him; that if he made it, it could be
10 used against him; that he was entitled to the
11 assistance of counsel before making any statement,
12 either orally or in writing, and that he had a
13 right to have counsel appointed if he couldn't
14 afford one. If the government can't prove all
15 that, then disregard the statement.

16 If the evidence in the case does not con-
17 vince you beyond a reasonable doubt that his
18 statement was made voluntarily and intentionally,
19 you should disregard it entirely. On the other
20 hand, if the evidence in the case does show be-
21 yond a reasonable doubt that it was knowingly and
22 voluntarily made, under the tests I gave you, then
23 you may consider it as part of the case against
24 the defendant Trespalacios.

25 If you find the defendant Trespalacios made

1 3 Charge of the Court

2 an exculpatory statement, first said, "I never
3 introduced Arlen to Pantoja." And you find he
4 made that statement knowingly, and that it later
5 proved to be false, you are convinced it's false,
6 you may consider such exculpatory statement in
7 determining the guilt or innocence of the de-
8 fendant Trespalacios.

9 When a defendant voluntarily and intention-
10 ally offers an explanation, or makes some state-
11 ment intending to show his innocence, and this
12 explanation or statement is later shown to be false,
13 the jury may consider whether this circumstantial
14 evidence points to a consciousness of guilt.
15 Ordinarily, it is reasonable to infer that an
16 innocent person does not usually find it necessary
17 to invent or fabricate an explanation or statement
18 tending to establish his innocence, whether or not
19 evidence as to a defendant's voluntary explanation
20 or statement points to a consciousness of guilt,
21 the significance to be attached to such statements
22 are matters exclusively within the province of the
23 jury.

24 Now we come to the specific charge in the
25 indictment. Firstly, I charge you that you are not

1 4 Charge of the Court

2 to be concerned with why others charged to be
3 conspirators in this conspiracy are not before
4 you. That is outside of your province. You are
5 only to consider the guilt or innocence of these
6 defendants on this charge.

7 The United States of America against
8 Howard Fuchs and Carlos Trespalacios. The charge
9 is as follows -- incidentally, again, the indict-
10 ment is not proof of the charge in the indictment.
11 The defendants have pleaded not guilty. It is as
12 if in a civil case A sued B and A said B owed him
13 \$100. Well, the mere fact that A put it in a
14 complaint would not be proof of it. You couldn't
15 come before a jury and say, "Well, here's the
16 complaint. That's proof that he owed me the money."
17 Oh, no, you have to have proof separate and apart
18 from the charge.

19 Count 1 charges as follows:

20 On or about the 2nd week of September 1972
21 and the 2nd week of May 1973, both dates being
22 approximate, within the Eastern District of New
23 York and elsewhere, the defendants HEMEL PANTOJA,
24 HOWARD FUCHS, JUAN CONALEZ, MICHAEL ARLEN,
25 EDWARD COHEN and CARLOS TRESPALACIOS, together

1 5 Charge of the Court

2 with others known and unknown to the grand jury,
3 did knowingly and intentionally combine, conspire,
4 confederate and agree to violate Section 841(a)(1),
5 Section 952(a) and Section 960(a)(1) of Title 21,
6 United States Code.

7 1. It was part of said conspiracy that
8 the defendants and co-conspirators would knowingly
9 and intentionally import into the United States
10 from places outside thereof, substantial quantities
11 of cocaine, a Schedule II narcotic drug controlled
12 substance.

13 2. It was further part of said conspiracy
14 that the defendants and co-conspirators would
15 knowingly and intentionally distribute and possess
16 with intent to distribute substantial quantities
17 of cocaine, a Schedule II narcotic drug controlled
18 substance.

19 3. It was further a part of said con-
20 spiracy that the defendants and co-conspirators
21 would conceal the existence of the conspiracy and
22 would take steps designed to prevent disclosure
23 of their activities.

24 In violation of Title 21 United States Code
25 Section 846 and Section 963.

1 6 Charge of the Court

2 I hold before me one of the many volumes
3 of statutes enacted by the Congress. Most of our
4 law is codified, and this happens to be one of the
5 titles, Title 21. It says Food and Drugs. In
6 1970 the Congress passed an act commonly known as
7 the Drug Abuse and Control Act of 1970. In the
8 act itself the Congress makes a determination and
9 finding to strictly control the manufacture, im-
0 portation, sale and distribution of drugs.

1 The Congress, under Section 812 of Title
2 21 -- and I know you are not going to remember
3 these numbers, but I put it down because it has
4 some significance in the recording -- established
5 certain schedules, and under Schedule II it is
6 stated, "A. The drug or other substance has a
7 high potential for abuse."

8 "B. The drug or other substance has a
9 currently acceptable medical use in treatment in
0 the United States or a currently accepted medical
1 use with severe restrictions."

2 "C. Abuse of the drug or other substances
3 may lead to severe psychological or physical de-
4 pendence."

5 Now, under Schedule II it lists cocaine in

1 7 Charge of the Court

2 the following language: "Coca leaves and any
3 salt compound derivative or preparation of coca
4 leaves and any salt compound derivative or a pre-
5 paration thereof which is chemically equivalent
6 or identical with any of these substances."

7 So cocaine is a Schedule II drug.

8 Now, the indictment referred to certain
9 sections in the Drug Abuse and Control Act of
10 1970. First it referred to 841(a)(1) and it
11 says, "Prohibited acts:

12 "It shall ..." -- I shall just read a
13 part of it: "It shall be unlawful for any person
14 knowingly or intentionally to possess with intent
15 to distribute a controlled substance." So the
16 Congress proscribed, prohibited the possession
17 with intent to distribute cocaine.

18 Under Section 952, it made it a crime to
19 import cocaine, in the following language, and I
20 will read part of it:

21 "It shall be unlawful to import into
22 customs territory of the United States from any
23 place outside thereof, or to import into the
24 United States from any place outside thereof any
25 controlled substance in Schedule I or II."

1 8 Charge of the Court

2 In 960(a)(1), it says "Prohibited acts:

3 "Any person who, contrary to Section 952
4 of this title, knowingly or intentionally imports
5 a controlled substance commits a crime."

6 Thus far I have read to you the statutes
7 upon which what we call substantive crimes are
8 based. This indictment does not charge a sub-
9 stantive crime. It charges a conspiracy and the
10 conspiracy it charges is under Section 846 and
11 963. I read you the other sections because these
12 sections refer, in the language you will hear
13 soon, to these types of crimes by referring to the
14 sub-chapters. 846 and 963 read exactly the same.

15 846: "Any person who conspires to commit
16 any offense defined in this sub-chapter" commits
17 a crime. And so 963 says "Any person who conspires
18 to commit any offense defined in this sub-chapter"
19 commits a crime. So there is the statutory basis
20 upon which the indictment rests.

21 The indictment charges a conspiracy to
22 import cocaine and to possess cocaine with intent
23 to distribute. That means to possess cocaine not
24 for oneself but for the purpose of either selling
25 it or giving it to others.

1 9 Charge of the Court

2 One of the lawyers in summation analogized
3 a conspiracy to a partnership, and I don't quarrel
4 with that, except the analogy is not that precise,
5 it is not that exact.

6 A conspiracy is a combination of two or
7 more persons by concerted action to accomplish an
8 unlawful purpose. It is a kind of a partnership
9 in criminal purpose in which each member becomes
10 the agent of every other member. The gist of the
11 offense is an understanding, an intention to dis-
12 obey or disregard the law.

13 Now, mere similarity of conduct among various
14 persons, and the fact that they may have associated
15 with each other, they may have assembled together
16 and discussed common names and interests, does not
17 necessarily establish proof of the existence of a
18 conspiracy. However, the evidence in the case need
19 not show that the members entered into any express
20 or formal agreement or that they directly by words
21 spoken or in writing stated between themselves
22 what their object or purpose was to be, or the
23 details thereof, or the means by which the object
24 or purpose was to be accomplished.

25 What the evidence in the case must show

1 10 Charge of the Court

2 beyond a reasonable doubt in order to establish
3 proof that a conspiracy existed is that the
4 members in some way or manner, or through some
5 contrivance, positively or tacitly came to a
6 mutual understanding to try to accomplish a common
7 and unlawful plan.

8 (Continued on next page.)

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2 The evidence in the case need not establish
3 that all the means or methods set forth in the
4 indictment were agreed upon or carried out, nor
5 that all the means or methods were agreed upon
6 were actually used or put into operation, nor that
7 all of the persons charged to have members of
8 the alleged conspiracy were such. What the evi-
9 dence in the case must establish beyond a reason-
10 able doubt is that the alleged conspiracy was
11 knowingly formed and that one or more of the
12 means or methods described in the indictment were
13 agreed upon to be used in an effort to effect
14 or accomplish some object or purpose of the con-
15 spiracy as charged in the indictment, and that
16 two or more persons, including one or more of the
17 accused, were knowingly members of the conspiracy
18 as charged in the indictment.

19 Now, one may become a member of the con-
20 spiracy without full knowledge of all the details
21 of the conspiracy; on the other hand, a person
22 who has no knowledge of a conspiracy, but happens
23 to act in a way which furthers some object or
24 purpose of the conspiracy, does not thereby
25 become a conspirator.

For example, let's assume that Mr. Jones
is driving a car and Mr. X on a street corner
thumbs a ride. "Come on, jump in." And they are
traveling along and then they are stopped. Mr. X
is arrested. They find that he has concealed on
him some contraband -- I don't care what it is,
it could be narcotics, it could be a weapon --
anything -- well, Mr. Jones, who was driving
along, is not guilty of a crime. Sure he performed
one of the acts, he was facilitating the trans-
portation, making it easy to convey whatever it
was, but criminal knowledge wasn't there.

There are two elements, general elements
to crime generally. One is the proscribed conduct,
the Congress says, "Do not." The other is criminal
intent.

If you recall the phrase, all the statutes
said, "Knowingly or intentionally." That is
criminal intent. It says whoever knowingly or
intentionally performs certain acts is guilty
of the crime, so you must have both. So the
one who was carrying the narcotics, if it was
proved that he knew it was narcotics, he would
be committing a crime. The other fellow that

1 3 Charge of Court

2 drove along, even though he was promoting the ven-
3 ture, even though he knew Mr. X, that doesn't
4 prove that he had knowledge of the illegal
5 activity that was carried on or participated in.

6 I will charge you on the elements, and
7 the element on criminal intent in this case is
8 knowingly and intentionally entering into the
9 conspiracy.

10 You have heard charges about how to treat
11 the evidence. It was discussed by the lawyers
12 in summation. Well, there are two purposes,
13 or two uses of evidence, and you may not use all
14 the evidence for both purposes. If you recall,

15 I charged you that the statements and acts made
16 outside the presence of the defendants was not
17 chargeable to the defendants, on the theory that
18 a person is chargeable only for what he does
19 personally. Guilt in criminal law is a personal
20 thing. You are not accountable for -- well,
21 idiomatically, you are not accountable for your
22 brother's action. It is only when the Govern-
23 ment establishes that the conspiracy set forth
24 in the indictment existed for the purposes, and
25 you find that someone who is a member of the

2 conspiracy says or does something during
3 the term of the conspiracy, and to further the
4 purpose of the conspiracy, whatever it is, negotiat-
5 ing for cocaine, picking up the cocaine, whatever
6 it is within the objects and purposes of the
7 conspiracy, then the defendant is bound by that
8 evidence, if first you find the defendants knowingly
9 and wilfully entered into that conspiracy.

10 This is a severe limitation. In order for
11 you to find a defendant knowingly and wilfully
12 entered into the conspiracy, you may only consider
13 evidence of that defendant's statements or acts.
14 In other words, the testimony of a witness as to
15 what the defendant said and did -- for example,
16 and I don't know whether you will find this in
17 the record -- before, and I don't pass on the
18 credibility of the testimony of Mr. Cohn and
19 Mr. Arlen, but one of them, I think Mr. Cohn,
20 testified that before he met the defendant Fuchs
21 for the second time he and Arlen, and maybe
22 Richardson, I am not sure, discussed the defendant
23 Fuchs.

24 As you notice, I have an outline of what
25 I am going to say, but as I talk with you I think

of things that I am afraid I am going to miss,
and I am just noting it and hope I don't. But
the testimony is that they discussed Fuchs and
narcotics. But you may not use that proof to
determine whether Mr. Fuchs knowingly and wil-
fully entered into the conspiracy. When Michael
Arlen testified as to the conversations and trans-
actions he had had with Mr. Fuchs, that is direct
testimony, if you believe it -- and I am not passing
on credibility again -- as to whether he knowingly
and wilfully entered into the conspiracy.

So under one purpose, it is really a ques-
tion of whether you may consider the testimony,
the admissibility of the evidence. The other
question is on the essential element of the crime
charged, and only testimony as to what the defen-
dant said and did is admissible to determine
whether the defendant entered into the conspiracy,
not what somebody else said and did, or what
he made reference to the defendant about -- that
may not be considered to determine whether he
entered into the conspiracy.

Now, Mr. Cohn's testimony is that he started dealing with the members sometime in December.

I just use as an example, Mr. Cohn will be bound by anything that happened before. Once you find that somebody entered the conspiracy, then he is bound by anything that happened since the inception of the conspiracy. Similarly, once the Government proved that a defendant -- in this case I refer to Mr. Trespalacios, the evidence against Mr. Trespalacios -- proved that he entered into the conspiracy, the Government need not prove that he continued throughout the term of the conspiracy. In other words, once he became a member of the conspiracy, if the Government proved that beyond a reasonable doubt, then he has committed the crime. Again, the only question that would arise is whether he is bound by what happened in the latter part of the conspiracy.

If there is something in the record that indicates to you that he quit the conspiracy then he would not be bound by the evidence. Again, he would no longer be a partner.

But on the question of liability, of the defendant's guilt, if you find that -- as I will charge you later -- the Government proved all the

2 essential elements of the crime, the fact that he
3 is not in the conspiracy to its termination
4 would not affect the liability. Once you find
5 he committed the crime, what he did after that
6 would not be a defense and would not be any excuse.

7 Now I come to the essential elements of
8 the crime charged. The Government must prove
9 beyond a reasonable doubt, one, that the
10 conspiracy described in the indictment was wilfully
11 formed and existed at or about the time alleged
12 for the purposes set forth in the indictment;

13 Two, that the accused knowingly and in-
14 tentionally entered into the conspiracy, being
15 aware -- that's what knowingly means -- being
16 aware that it was for the purpose of importing and
17 possessing cocaine with intent to distribute.

18 Now, the Government does not have to prove
19 both objectives. If it proves one, it has
20 satisfied the requirement.

21 Now, again, knowingly means that it is not
22 just by mistake or pure accident or ignorance.
23 It is intending to perform the act knowing that
24 it is a violation of law.

25 (Continued on next page.)

2 THE COURT (Cont.): Next, that one of the
3 conspirators thereafter knowingly committed an
4 overt act. That means an act that is in further-
5 ance of the conspiracy, and that such act was
6 knowingly done in furtherance of the conspiracy;
7 in other words, what was done the conspirator did
8 being aware that he was furthering the purposes
9 of the conspiracy.

10 Now, as one of the lawyers mentioned, and
11 as I observed, the analogy between a legal partner-
12 ship and a criminal conspiracy is fine for defini-
13 tion and for familiarizing the jury with a concept,
14 because it is not an easy concept to grasp, but it
15 is not precise. These aren't partners who do
16 business every day, these are not partners who
17 keep books, these are not partners who enter
18 into formal and express agreement over a table.
19 The government need not prove all that. As I
20 said, they must prove that there was a tacit under-
21 standing on what they were doing and what the ob-
22 jectives were. In this type of conspiracy, which
23 is described as a chain conspiracy, not all the
24 partners have the same duties. They are not on
25 the same level of participation.

In this case, the government in effect
is charging the defendant Trespalacios with
being the person who made the deal initially. He
brought the parties together for this conspiracy.
He might be similar to a broker in a transaction,
bringing parties together in a business. Mr.
Pantoja was the importer. He brought the cocaine
in. Mr. Arlen was a distributor. The government
charges Mr. Fuchs and Mr. Cohn with being whole-
salers and the government charges Cohn with being
a wholesaler and a retailer and Richner with
being a retailer. I don't pass on the validity
of the government's position. So that you might
understand what the government's position is with
reference to the position of a chain conspiracy,
I have outlined generally what the position is.

The evidence as to Mr. Trespalacios --
the evidence in this case is that there was an
introduction. If that is all the government has
shown, that it was just an introduction, then
you must find the defendant not guilty. Then
the government has not proved the crime.

The government must prove that when the
introduction was made Mr. Trespalacios knew that

2 it was for the purpose of bringing parties to-
3 gether to bring in and/or distribute this
4 cocaine. The government again need not prove
5 Mr. Trespalacios knew or expected that this would
6 be going on for months or years or any other
7 period of time. But if it's the sole transaction
8 or event, then the government must prove that
9 this one introduction was with the understanding
10 that this was going to be a business, not just a
11 single incident, because again we are talking
12 about a type of business.

13 The government need not prove that Mr.
14 Trespalacios profited or that he got anything.
15 Again, I refer you to those essential elements of
16 the crime. The government must prove all the
17 essential elements of the crime, not three out
18 of four, and all the essential elements of the
19 crime beyond a reasonable doubt.

20 You will shortly be excused to deliberate
21 on the matter before you. Each juror must de-
22 cide the case for himself and herself, but it
23 would be wrong, improper and a violation of your
24 duty if you took a position and refused to dis-
25 cuss your position with your fellow jurors.

2 The jury process is a deliberate process.

3 Discuss the evidence, go over it, try to convince
4 each other with a view to arriving at a unanimous
5 verdict.

6 It would be equally improper for any juror
7 to go into the jury room and say, you know, they
8 call me good time Charlie, or good time Name, I
9 don't care which it is, I don't want to argue
10 with you fellows. Whatever you say is all right
11 with me. That is absolutely wrong.

12 Both sides are entitled to your considera-
13 tion, your analysis of the evidence, an exchange
14 of arguments with a view to arriving at a unanimous
15 verdict.

16 During your deliberations you may have
17 occasion to ask questions of the Court. I cannot
18 go outside the record, I cannot give you my
19 impressions, I cannot give you my opinions, I
20 cannot make inferences -- that's your job, not
21 to go outside the record. But I can't tell you
22 what the record means; interpret it yourself, the
23 inferences are yours. If you want the testimony
24 of any witness, it has all been transcribed and
25 tell me what you want -- when I say "Tell me,"

2 you go through your foreman and through the
3 marshal assigned to the case and then I will
4 get it. Then I will call the lawyers in and
5 tell them I have a question and I will discuss
6 it with them, and we will try to understand what
7 your question is. I will then try to locate the
8 testimony you want and then I will call you in
9 and read it to you.

10 When all the jurors have said they have
11 had enough then I will stop right there.

12 During your deliberations, don't tell me
13 how you stand on the verdict. Don't tell me
14 that you are 6 to 6, 8 to 4, 11 to 1; I am in-
15 terested when it is all 12. You will just say
16 unanimous verdict. Don't tell me what the verdict
17 is.

18 The first time I should be privy to what
19 the verdict is is when I call you into Court
20 after I receive the note. I ask the foreman to
21 stand and I say Madam Foreman, what is your
22 verdict as to each defendant on the charge in
23 the indictment? What is your verdict as to Howard
24 Fuchs? And you will say guilty or not guilty,
25 and I will say what is your verdict as to Carlos

2 Trespalacios and you will say guilty or not
3 guilty and you will sit down.

4 I ask juror number 2 whether you have
5 heard the verdict, whether you agree that that's
6 your verdict, and number 3 I will ask whether
7 that is your verdict, and so on until 12. And
8 when all 12 agree in open Court, then it becomes
9 officially the verdict of the Court and not before.
10 So don't tell me anything before you say it in
11 open Court.

12 I will excuse you for a few moments and
13 I suppose the lunch has arrived. I don't want
14 you to discuss this case at all. You are not at
15 liberty to discuss it yet, don't talk about the
16 case. But if you would like to start your lunch,
17 you can do that. So the jury is excused, and I
18 will probably call you back in about ten or
19 fifteen minutes or before. I may interrupt your
20 lunch, but I won't take too much of it and you
21 will get right back to it.

22 I am advised the lunch is not in the jury
23 room, it is in my chambers, so you won't have
24 your lunch until after I have talked to the lawyers
25 and call you back. So when you go back the second

time you will have your lunch.

The jury is excused.

(Jury excused.)

(father of defendant Howard Fuchs)

THE COURT: Mr. Fuchs, /any time the jury

is in this Courtroom I want you to stand or sit

on my extreme left out of sight of the jury,

out of their view. I don't care where you sit,

but outside of the view of the jury, and I don't

want you walking up and down.

You may leave, if you wish. I don't want
the jury to see you grimacing or dabbing your
eyes. They will decide the case on the record.

Mr. DePetris, are there any exceptions or
additions?

MR. DE PETRIS: Your Honor, the only thing
I might mention is that, in addition to possession
with intent to distribute there is also the
distribution, and that was not mentioned during
the charge.

THE COURT: I said possession with intent
to distribute, knowingly and intentionally
possessed with intent to distribute. You're
right, but I am not going to charge it. I read
it hurriedly and I have possession with intent to

CHARGE

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distribute.

Mr. Solomon.

MR. SOLONAN: Really, your Honor --

THE COURT: It is you, Mr. Rothblatt.

6 MR. ROTHBLATT: Whatever you say, your
7 Honor. I have no exceptions except to the extent
8 that your Honor declined to charge as we have
9 requested in our formal requests.

THE COURT: That is preserved.

Mr. Solomon.

12 MR. SOLOMAN: Your Honor, request number
13 7 which you said that you would --

THE COURT: Then I learned that there were admissions. It just isn't true. Of course if they reject all the testimony, I think that is implicit in what I said, but I won't charge that it is based solely on Mr. Arlen's testimony.

Any other exceptions, Mr. Solomon?

MR. SOLOMAN: No.

THE COURT: Will you please ask the jury
to come in.

(The jury present.)

THE COURT: At this point I must excuse
alternate number 1 and 2. You have served very

1
2 purpose. We never know whether one or more
3 jurors are going to be excused, particularly
4 in this terrible weather. But the jurors made
5 it every day and made it on time, but you have
6 served a function. I slept better nights know-
7 ing that if one or two were excused that we
8 would still be able to go to verdict on this.

9 So take whatever you have out of the jury
10 room and then go to my chambers and ask for your
11 lunch, it's there. You may not sit with the
12 jury from here on.

13 (Alternates excused.)

14 THE COURT: Please swear in the marshal.

15 (One marshal duly sworn by the Clerk of
16 the Court.)

17 THE COURT: You are excused for delibera-
18 tion on the matter before you. Of course you
19 will first have you lunch.

20 If I get any note at any time before 2:15,
21 I probably won't be able to take care of it be-
22 cause I must discuss it with the lawyers first
23 and I am going to excuse them for lunch. So don't
24 think I am not paying attention to you. It is
25 only because I can't get around to it then. But

CHARGE

1260

I know that you will make your determination
fairly and in accordance with your oath you will
render a true and just verdict, and that means
on the evidence, free of all bias, prejudice and
sympathy, and no one will be able to complain
about your determination. Then you shall have
been fair.

The jury is excused for deliberation on
the matter before it.

(Whereupon, the jury repaired to commence
deliberations at 1:07 p.m..)

THE COURT: All right, gentlemen, you are
excused until 2:15.

(Continued on next page.)

PM next

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JB:ss
1PM

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CHARGE

A F T E R N O O N S E S S I O N

3 3:00 o'clock p.m..

4 (The following took place in the absence
5 of the jury.)

6 THE COURT: I have a note from the jury.

7 "Testimony of Michael Levine, witness for
8 the prosecution, relative to the defendant Carlos
9 Trespalacios' participation in this conspiracy
10 surrounding his arrest."

11 Mark this.

12 THE CLERK: Jury note so marked Court exhibit
13 8.

14 THE COURT: I have marked off the testimony.
15 It starts at 632.

16 All right, you can bring the jury in.
17 It really starts on the last line of 631.

18 (Whereupon, the jury entered the Courtroom.)

19 THE COURT: I have your note asking for
20 Michael Levine's testimony concerning the de-
21 fendant Trespalacios, surrounding his arrest. I
22 will start at the very outset and then when all
23 12 of you raise their hands -- you don't have to
24 keep them raised. I will remember it. Then I
25 will stop.

1 2

CHARGE

2 Starts at the bottom of --

3 And every once in a while when jurors see

4 me read from a transcript they ask to send the

5 transcript in. I can't do that. Everything

6 that happens in the trial, even the matters that

7 I exclude from you, are in the transcript. So I

8 couldn't give you the transcript. It's not that

9 I like secrets. I want you to decide this case

10 on just what is properly admitted in evidence.

11 At bottom of page 631, line 25.

12 (Record read.)

13 THE COURT: Then the jury was excused, and

14 then at page 649:

15 (Record read.)

16 THE COURT: How many still want to hear

17 testimony?

18 No one..

19 Everyone is satisfied that they have heard

20 what they wanted to hear.

21 All right. Thank you. The jury is excused

22 for further deliberation on the matter.

23 (Whereupon, the jury retired from the Court-
24 room.)

25 MR. SOLOMAN: Your Honor, may I make a

1
2 statement? Your Honor, I would have liked you
3 to read -- continue the examination of Mr. Levine
4 because we got into some areas now where Mr.
5 Trespalacios' girlfriend was involved. And I
6 believe -- it is only my belief that the reason
7 they wanted to find out the -- particularly about
8 the arrest was from a point of view as to what
9 duress the defendant was under during the time
10 that he made these statements to the government
11 agent while he was not represented by an attorney.

Now, the jury could rehear the fact that his girlfriend was present, that she was questioned about her status as an alien, et cetera, that could throw further light perhaps on some of the duress that Mr. Trespalacios was under at the time that he made the statements.

18 THE COURT: Do you agree that all 12 jurors
19 said they didn't want to hear any more.

20 MR. SOLOMAN: Well, there was some hesita-
21 tion.

22 THE COURT: All right. We will bring the
23 jury back. We will get a poll.

It has to be clear on the record.

(Whereupon, the jury entered the Courtroom.)

1
4

2 THE COURT: I want to make certain that
3 when I stopped reading the testimony, that that
4 was the wish of every juror. Now, don't hesitate
5 to say you would like to hear more because I'd
6 be happy to read it.

7 Is there anybody here who wants me to go
8 beyond what I gave? Anybody?

9 Are you sure?

10 Do all the lawyers agree that every juror
11 here said they don't want to hear any more? Be-
12 cause if there is any question about it, I will
13 poll each juror.

14 Mr. DePetris, do you agree.

15 MR. DE PETRIS: Yes.

16 THE COURT: Mr. Rothblatt.

17 MR. ROTHBLATT: It would appear by their
18 silence that they are satisfied.

19 THE COURT: No, not by their silence.

20 Each one shook their heads. I will take a vote.

21 MR. ROTHBLATT: I have no question.

22 THE COURT: Any question in your mind.

23 MR. SOLOMAN: No.

24 THE COURT: They don't want to hear any
25 more.

1 5

2 It's the jury's wish as to what they want
3 to hear. That is what controls my reading. And
4 I must be satisfied that that is all that the
5 jury wanted to hear.

6 Now the jury's excused for further deliberations on the matter.

8 (Whereupon, the jury retired from the
9 Courtroom.)

10 (Recess taken.)

11 THE CLERK: Jury note marked Court exhibit
12 9 for identification.

13 THE COURT: All right, seat the jury.

14 "May we have the grand jury report."

15 That's all they want.

16 (Whereupon, the jury entered the Courtroom.)

17 THE COURT: I have your note which you in
18 effect ask that I read to you portions of the
19 grand jury testimony used by Mr. Soloman in cross-
20 examining Michael Arlen.

21 Is that correct.

22 MADAM FOREMAN: Yes.

23 THE COURT: Now, everybody said, "Yes." I
24 interpreted it right.

25 Reading from page 354 line 23.

1 6

CHARGE

2 (Record read.)

3 THE COURT: The answer is the line of
4 questioning asked by Mr. Solomon.

5 (Record read.)

6 THE COURT: Now, I have given you only
7 what you asked for. If you want more, don't
8 hesitate to ask.9 All right. Write it on a note and give --
10 if you have any further testimony you want to
11 hear or any questions that you have, write it on
12 a note and give it to your foreman.13 (Whereupon, the jury retired from the
14 Courtroom.)

15 (Recess taken.)

16 THE COURT: We have a verdict.

17 THE CLERK: Jury note marked Court exhibit
18 10 for identification.

19 THE COURT: All right, seat the jury.

20 (Whereupon, the jury entered the Courtroom.)

21 THE COURT: Madam Foreman, would you please
22 stand.23 I have the note of the jury saying, "We
24 have reached a verdict in the case of United States
25 of America against Howard Fuchs and Carlos

1 7

2 Trespalacios."

3 How do you find the defendant Howard Fuchs?

4 Guilty or not guilty.

5 MADAM FOREMAN: Guilty, your Honor.

6 THE COURT: How do you find the defendant
7 Carlos Trespalacios? Cuilty or not guilty.

8 MADAM FOREMAN: Not guilty.

9 THE COURT: Juror number 2, you heard the
10 verdict of your foreman. Is that your verdict.

11 JUROR NUMBER 2: Yes.

12 THE COURT: Juror number 3, is that your
13 verdict.

14 JUROR NUMBER 3: Yes.

15 THE COURT: Juror number 4, is that your
16 verdict.

17 JUROR NUMBER 4: Yes.

18 THE COURT: Juror number 5, is that your
19 verdict.

20 JUROR NUMBER 5: Yes.

21 THE COURT: Juror number 6, is that your
22 verdict.

23 JUROR NUMBER 6: Yes.

24 THE COUNT: Juror number 7, is that your
25 verdict.

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8

CHARGE

2 JUROR NUMBER 7: Yes.

3 THE COURT: Juror number 3, is that your
4 verdict.

5 JUROR NUMBER 8: Yes.

6 THE COURT: Juror number 9, is that your
7 verdict.

8 JUROR NUMBER 9: Yes.

9 THE COURT: Juror number 10, is that your
10 verdict.

11 JUROR NUMBER 10: Yes.

12 THE COURT: Juror number 11, is that your
13 verdict.

14 JUROR NUMBER 11: Yes.

15 THE COURT: Juror number 12, is that your
16 verdict.

17 JUROR NUMBER 12: Yes.

18 THE COURT: So say you all.

19 Do you want to make any motions before I
20 discharge the jury.

21 MR. ROTHEBLATT: Not at this point.

22 THE COURT: Wait.

23 MR. ROTHEBLATT: Not at this time, your
24 Honor.

25 THE COURT: All right. The jury is excused

1

9

2 with the thanks of the Court. I usually make
3 some speech or statement when I know it's your
4 last day. But I want to say nothing in this
5 case that might influence or prejudice you on
6 any other case that you might be picked to serve
7 on. That is a possibility.

8 So it is enough if I just thank you for
9 the serious attention you gave this. And I am
10 sure you did. And I ask you report to the Central
11 Jury Room downstairs for further instructions.

12 (Whereupon, the jury retired from the
13 Courtroom.)

14 THE COURT: The Clerk is directed to enter
15 a judgment of acquittal in favor of the defendant
16 Carlos Trespalacios.

17 But I want to tell you, Mr. Trespalacios,
18 all the jury found, if you listen to the charge,
19 was that the government didn't prove its case
20 against you. Now, that ought to tell you some-
21 thing.

22 MR. SOLOMAN: Your Honor --

23 THE COURT: The defendant Trespalacios is
24 discharged.

25 MR. SOLOMAN: Bail is exonerated.

1 10

CHARGE

2 MR. ROTHBLATT: It is exonerated auto-
3 matically.

4 MR. SOLOMAN: The passport -- I think Mr.
5 DePetris has my client's passport.

6 THE COURT: The passport? Well, that
7 depends on the government. I wouldn't have any-
8 thing to do with that. Let the government de-
9 cide what they are going to do with it.

10 I don't know whether on the proof here this
11 defendant is going to be allowed to stay here. He
12 has just been acquitted of the crime charged.
13 Nothing else.

14 Now, Mr. Rothblatt, I don't know whether
15 you are interested in being with your client when
16 he is interviewed by the probation department.
17 But I would like a full and complete report on him.
18 I am going to ask probation to do its best to
19 expedite -- usually it takes about 4 to 6 weeks.
20 I would like it sooner if that is at all possible.

21 I will ask probation to interview him down-
22 stairs in the marshal's office. And he will be
23 here at least until 4 or 4:30, won't he, Marshal?

24 DEPUTY MARSHAL: Yes.

25 MR. ROTHBLATT: Would your Honor continue

1 11

2 the remand to the federal house of detention.

3 THE COURT: I don't know. I will leave
4 that with the prison authorities. I don't know
5 what our problems are there.

6 MR. DE PETRIS: I know that West Street
7 is very crowded, your Honor.

8 THE COURT: If it's going to be 4 or 6
9 weeks, I am not going to insist that he be kept
10 there. What for?

11 MR. ROTHBLATT: May we see you in camera.

12 THE COURT: No. I don't see the reason for
13 it.

14 MR. ROTHBLATT: Well, would your Honor --
15 I would suggest there is a good reason for it.

16 THE COURT: All right. I will see you
17 after I hear the bail application. I want what
18 is said on the record.

19 MR. ROTHBLATT: That is perfectly all right.
20 But I would like it sealed. I don't mind Mr.
21 DePetris being present. I just want it in camera.
22 I don't see --

23 THE COURT: You want to see me?

24 MR. ROTHBLATT: No. I want our discussion
25 in camera with Mr. DePetris. I just don't want it

1 11a

CHARGE

2 in open Court.

3 THE COURT: All right. I have a bail
4 application in Duke. United States against Duke.
5 I will hear that first and then I will hear you.

6 (Recess taken.)

7 * * * *

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**CHARGE
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1 in this court today during the period of supervision
2 while a person is out, that can be a greater deterrent
3 than anything else, because if he violates either
4 probation or parole then he has got to go back and do
5 all of the time that he owes; so I ask Your Honor to
6 impose a sentence with minimum incarceration but maxi-
7 mum supervision so that the best that was put in
8 Howard during the fine training that he got from his
9 family, his schools and institutions that he attended,
10 the religious leaders who tried to inculcate the
11 highest sight of morality in him so that can be proved,
12 and I ask that such a sentence be imposed.

13 THE COURT: I am not given to the sermons or
14 speeches in sentencing because I think it's unfair to
15 the defendant. I seldom reprimand a defendant for
16 what he has done, but this is an unusual probation
17 report because attached to it is an extensive brief
18 by Mr. Rothblatt with many exhibits attached, they
19 consist of many letters. I haven't counted them but
20 probably 25 to 30 people signed these letters. They
21 weren't just names. These people are people who have
22 grown up with Mr. Fuchs. There is a professor who
23 wrote me and I read his letter twice because he said
24 he didn't think that I would answer it, and he hoped
25 that I would read it. The implication was that I

1 probably wouldn't take the time to read it. All
2 expressed surprise, disbelief, that this defendant
3 could have been dealing in cocaine, even his former
4 father-in-law sent a very touching letter. I would
5 have expected because of the breakup between this
6 defendant and his wife that the parents of his wife
7 would have used this as a platform to vent their
8 spleen. They didn't do that, very unusual. The only
9 difference between all the people who knew this
10 defendant and I who learned about him during the trial
11 is that I learned what happened to this defendant from
12 about 1968 to the present time. A stranger thing
13 about this defendant is that few of his friends knew
14 about him from his recent history. Few defendants
15 have come before me that made such a complete turn-
16 about as this defendant. I've observed this defendant
17 throughout the trial. I put out of mind your char-
18 acterization of Mr. Arlan because I recognize that
19 that's a lawyer's, either duty or argument in which
20 he pictures the government's witnesses as the devil,
21 and I put that out of my mind because I think that
22 each one of the government witnesses, particularly
23 Arlan and Cohen are in an entirely different categories,
24 though Cohen had pretty much the same upbringing, he
25 came from the same segment of society, student college

1 training, degrees, every reason to succeed here, but
2 I can't help but remember a portion of the summation,
3 it related to Arlan, but I think it could be directed
4 to the defendant how that witness and now this
5 defendant -- I don't dramatize it. I talk about the
6 children he put on, addicted to cocaine, that's a
7 very serious offense. It's only one reason why this
8 defendant went into it, he's a good businessman and
9 he could have made millions. He could have succeeded.
10 He made a lot of money. I can't disregard the testi-
11 mony that this defendant participated in stealing
12 some \$30,000 from one of his co-conspirators, and
13 though this defendant might shake his head and at
14 least try to forget it, it was apparent to me from his
15 questioning that it happened. He knew just how that
16 money was split, that's how greedy this defendant was;
17 and Mr. Cohen's testimony that they discussed murder --
18 no -- this defendant is a far different young man than
19 the young man that went to college. He's only con-
20 victed of one crime, but the proof shows that it was
21 over a long period of time. He was in business and
22 he intended staying in business and he was on the way
23 up and intended to be and hoped to be an important
24 cocaine dealer in this area. He didn't quite make it.
25 He was only in business under the charge in the

1 indictment about six months, that's all the testimony
2 was.

3 MR. DE PETRIS: Nine, ten months.

4 THE COURT: Nine, ten months. So I say this for
5 those people, good people, well-intended people who
6 remember Howard Fuchs and want me to believe that this
7 is the defendant standing before me, it isn't. He
8 may yet turn out to be. This was a trial that lasted
9 about nine or ten trial days.

10 MR. DE PETRIS: Six or seven.

11 MR. ROTHBLATT: We anticipated that but didn't
12 have it.

13 THE COURT: So I learned a lot about this
14 defendant. I might say we have a sentencing panel,
15 and my conferring judges did not have the proof before
16 them that I had during the trial, the burglary of
17 Arlan's apartment when he was gone, the discussion of
18 the murder of the informant.

19 MR. ROTHBLATT: I wonder whether Your Honor
20 would let us be heard on that because if that in-
21 fluences Your Honor --

22 THE COURT: He's being sentenced for the crime
23 he's been convicted of, but I'm telling you I had the
24 benefit of that and my conferees. The point I wanted
25 to make is that they recommended a higher sentence than

SENTENCING

1 I'm about to impose. If you want to state for the
2 record my version of the testimony -- this is just my
3 recollection. I remember the testimony but it's an
4 entirely different version. I know that it was Cohen's
5 idea completely, that he was to go to the Caribbean
6 with Cohen, and that's how he --

7 MR. ROTHBLATT: But the defendant had nothing to
8 do with it after it was a fact --

9 THE COURT: That's your version. I'm talking
10 what the testimony was. This witness never testified.
11 From the questioning of this witness, and it was his
12 choice, there was no question in my mind from the
13 manner in which he questioned Mr. Cohen that he shared
14 in that loot.

15 MR. ROTHBLATT: After a fact, after a fact, that's
16 true.

17 THE COURT: Let's forget about the burden, but
18 again I say, the point I'm making is that this is not
19 the same gentleman who these good people wrote to me
20 about.

21 MR. ROTHBLATT: That was part of the time --

22 THE COURT: To them this is inconceivable, and
23 yet he came before me and said, I shared in it. Now,
24 I don't expect Mr. Fuchs to admit nor do I want you
25 to discuss the participation in a discussion for murder-

1 ing the informant.

2 MR. ROTHBLATT: I'd be happy to discuss it.

3 THE COURT: This may very well be the subject
4 of another indictment, it's still a state crime.

5 MR. ROTHBLATT: Just to suggest to Your Honor.

6 THE COURT: Let's assume that he had nothing to
7 do with it, these people should know that these were -
8 his associates in business at least.

9 MR. ROTHBLATT: No argument.

10 THE COURT: That was his choice.

11 MR. ROTHBLATT: That he's guilty of associating
12 with him. I said, "You pick these characters to deal
13 with." On that we can't argue. He picked bad people.

14 THE COURT: Murder of an informant in the true
15 tradition of those involved in organized crime.

16 MR. ROTHBLATT: He had absolutely nothing to do
17 with it.

18 THE COURT: For these purposes, I'm assuming it
19 but I refuse to say any place that it didn't happen.
20 The testimony before me is that's just the way it
21 happened.

22 MR. ROTHBLATT: It was discussed, but he had
23 nothing to do with it.

24 THE COURT: The point I want to make, I have
25 this information. It isn't in the probation report.

1 This was not discussed. As a matter of fact, dis-
2 cussion was very brief about this defendant in our
3 sentencing panel. I seldom reveal what other judges
4 recommend, all I can say to you is that other judges
5 and one I won't identify him, -- sometimes you think
6 some judge is easy if you ask the lawyers at the bar,
7 I don't believe it that my two associates, I think
8 they would both say these are the light sentences, and
9 they would have imposed a heavier sentence and they
10 didn't have this information.

11 Howard Fuchs, the Jury having found you guilty
12 of the charge in the indictment, I sentence you to the
13 custody of the Attorney General of the United States or
14 his duly authorized representative who shall choose
15 the place of confinement for a term of ten years pur-
16 suant to 18 United States code, section 4203A2; and
17 in addition thereto, I impose a special parole term of
18 five years.

19 Now, having imposed sentence under rule 32 of
20 our federal criminal rules, I have the obligation of
21 advising you as to your constitutional rights in re-
22 lation to appeal. You have an absolute right to appeal.
23 You must file your notice of appeal within ten days
24 from the date of Judgment of conviction and I intend
25 that that judgment of conviction to be filed today.

1 If you wish, I'll direct the Clerk to file the notice
2 of appeal. You have the right to a free appeal if you
3 can't afford an appeal. The government will pay for
4 counsel and the cost of the transcript and any other
5 cost in relation to the appeal if you can make a show-
6 ing to me that you are unable to afford the prosecution
7 of the appeal, you tell me whether you want me to
8 appoint counsel, whether you want the government to
9 pay for the appeal. In other words, you are entitled
10 to the benefit of the criminal justice act.

11 MR. ROTHBLATT: First answer his Honor's re-
12 quest for the filing of a notice of appeal.

13 MR. FUCHS: Yes.

14 THE COURT: The Clerk is directed to file a
15 notice of appeal. Unless I find the defendant in-
16 digent, I must ask you for a \$5 fee.

17 MR. FUCHS: I would like to speak to my
18 parents first.

19 THE COURT: Appeal is expensive. I think that
20 you can expect overall costs between \$5,000 and \$10,000,
21 I think that's very modest. I might say to you,
22 Mr. Fuchs, one of the judges suggested he would also
23 impose a \$10,000 fine. I assume that the statement in
24 the probation report that you didn't know what was
25 happening to your money in your business was correct

1 and you didn't have the money, so I decided against
2 a fine. You talk to your folks now. Take a few
3 moments, or you can tell me you are entitled to the
4 benefits of the criminal justice act.

5 MR. FUCHS: I personally have no money.

6 THE COURT: What happened to the business?

7 MR. FUCHS: As I tried to tell you some got
8 closed down, \$2300 was taken away in the checking
9 account. My parents did retain Mr. Rothblatt through
10 the aid of Rabbi Bukor. Like I said, I've been in
11 jail since July.

12 THE COURT: I know your parents have a job in
13 a tailor shop.

14 I find the defendant is entitled to the benefits
15 of the criminal justice act. The Clerk is directed to
16 file the notice of appeal without fee. The reporter is
17 directed to transcribe the minutes of the trial and
18 assess the court 50 percent against the government and
19 50 percent against the funds of the criminal justice
20 act.

21 MR. DE PETRIS: The government already has a
22 copy.

23 THE COURT: Will you co-counsel? I would like
24 to save the government the money. I direct
25 Mr. Solomon to turn over the transcript of the trial

1 that he received under the criminal justice act
2 Mr. Rothblatt, so we'll save that money.

3 Mr. Fuchs, because of all the harsh things I've
4 said about you, I want you to know first that my sen-
5 tence was not to give you 4208A2. What I'm doing in
6 effect is leaving this to the authority of the prison
7 officials. This is only if the conviction is affirm-
8 ed on appeal. Secondly, as I say, in spite of all the
9 harsh things I said about you, I meant everyone of
10 them, that does not mean that you cannot make another
11 180 degree turn and face in the right direction. You
12 have everything it takes. I take no joy and no satis-
13 faction sending any young man to jail, and certainly
14 not sending any young man to jail for ten years. I'm
15 bothered about these things, and nothing would give me
16 more pleasure to learn that you have been released and
17 that you are a successful businessman, and I have every
18 reason to believe if you are ultimately turned in the
19 right direction, that's what's going to happen to you;
20 all this will turn out to be a sad, hard, long ex-
21 perience to you, but not everybody that goes to jail is
22 destroyed, some, not the majority, but people of your
23 quality do turn out very well, but it all depends on
24 you. All I can say is good luck to you.

25 (Whereupon sentence was concluded.)

AFFIDAVIT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

In The Matter

of

Intercepting telephonic communications being transmitted and received over telephone lines and instruments bearing numbers 725-8634 and 679-0673 and listed to ZACHARY FUCHS and being utilized by said (HOWARD) ZACHARY FUCHS and others.

STATE OF NEW YORK)
) ss.:
COUNTY OF BRONX)

ABELARDO DELGADO, being duly sworn deposes and says:

I am a Detective in the New York City Police Department shield #1816, assigned to the Bronx District Attorney's Office Squad, and currently working in the Narcotics Bureau of the Office of the Bronx District Attorney.

That since the week of April 16, 1972, brother officers and your deponent have been conducting an investigation into the illegal possession, sale, purchase, distribution and transfer of narcotic drugs by a number of individuals. That this investigation has been assigned Case #366/72.

That during the course of this investigation one HOWARD ZACHARY FUCHS became a major target of the investigation, and that surveillance of the said HOWARD

AFFIDAVIT

ZACHARY FUCHS commenced in September of 1972.

That subsequently your deponent was informed by Agent Thomas Murphy, Department of the Treasury, United States Bureau of Customs, that HOWARD ZACHARY FUCHS was also a target of a major investigation by the Bureau of Customs. That that investigation concerns the importation of large amount of cocaine into California from South America. That that investigation is numbered 6-15-998.

That on March 16, 1973, an ex parte order authorizing the interception of certain conversations being transmitted and received over telephone line and instrument bearing number 751-8600 was secured. That that Order is annexed hereto and made a part hereof as Exhibit "A".

That pursuant to that Order (Exhibit A), a conversation between one JOHN DOE EDDIE and HOWARD ZACHARY FUCHS was intercepted and recorded on March 19, 1973. That a transcript of said conversation is attached hereto and made a part hereof as set forth as Exhibit "B".

That pursuant to the same Order, another conversation, between the said JOHN DOE EDDIE, from telephone instrument number 751-8608, and HOWARD ZACHARY FUCHS, at telephone instrument 679-0673, was intercepted and recorded on March 19, 1973. That a transcript of said conversation is attached hereto and made apart hereof

AFFIDAVIT

as set forth in Exhibit "D".

That pursuant to the same Order, a conversation, between one JOHN DOE GARRY, A/K/A GARY WINKEL and HOWARD ZACHARY FUCHS was intercepted and recorded on March 28, 1973. That a transcript of the said conversation is attached hereto and made a part hereof as set forth in Exhibit "E".

That pursuant to the same Order, another conversation, between the said JOHN DOE GARRY, A/K/A GARY WINKEL and HOWARD ZACHARY FUCHS was intercepted and recorded on March 31, 1973. That a transcript of the said conversation is attached hereto and made a part hereof as set forth in Exhibit "F".

That pursuant to the same Order, another conversation between the said JOHN DOE GARRY A/K/A GARY WINKEL and JOHN DOE NICK, A/K/A NICHOLAS KYRANIOUS was intercepted and recorded on March 31, 1973. That a transcript of the said conversation is attached hereto and made a part hereof as set forth in Exhibit "G".

That pursuant to the same Order, another conversation between JOHN DOE GARRY, A/K/A GARY WINKEL and HOWARD ZACHARY FUCHS was intercepted and recorded on March 31, 1973. That a transcript of the said conversation is attached hereto and made a part hereof as set forth in Exhibit "H".

That pursuant to the same Order, three other con-

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versations, between JOHN DOE GARRY, A/K/A GARY WINKEL, from telephone number 751-8608 and JANE DOE SUSAN at telephone number 725-8634 were intercepeted and recorded on March 30, 1973. That transcripts of the said conversations are attached hereto and made a part here-of as set forth in Exhibits "I", "J" and "K", respectively.

That it is your deponent's opinion based upon 16 and 3/4 years experience as a police officer, the last 9 of which have been in the field of narcotics, that the transcribed conversation annexed as Exhibit B concerns a quantity of hashish which HOWARD ZACHARY FUCHS is to supply to JOHN DOE EDDIE; that the transcribed conversation annexed as Exhibit C refers to the fact that HOWARD ZACHARY FUCHS has, in his apartment, a quantity of hashish which EDDIE is to buy and distribute; that the transcribed conversations annexed as Exhibit "D" refers to the fact that HOWARD ZACHARY FUCHS has approximately 25 to 30 pounds of hashish for JOHN DOE EDDIE to buy and distribute and that JOHN DOE EDDIE should put aside his personal business lest he, JOHN DOE EDDIE, miss out on this transaction, as had occurred twice before; that the transcribed conversation annexed as Exhibit "E" refers to a trip that HOWARD ZACHARY FUCHS or his cohorts will be making to purchase cocaine and that he wants to know how much money to "invest" for GARY WINKEL and JOHN DOE EDDIE.

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Exhibit "E" also indicates that neither HOWARD ZACHARY FUCHS nor GARY WINKEL have any hashish at that time and that HOWARD ZACHARY FUCHS tells GARY WINKEL to telephone him at home with respect to their narcotics transactions; that the transcribed conversation set forth as Exhibit "F" refers to the fact that HOWARD ZACHARY FUCHS has a quantity of Pakistani hashish for GARY WINKEL and wants to know whether or not he, GARY WINKEL still wants 25 pounds. Exhibit "F" also indicates that GARY WINKEL tells HOWARD ZACHARY FUCHS that he wants 15 to 25 pounds of the hashish; that the transcribed conversation set forth as Exhibit "G" refers to the fact that JOHN DOE NICK, A/K/A NICHOLAS KRYANIOUS, a self-described "mutual friend of Howie's and Ed's", has 50 pounds of Pakistani hashish for \$775 per pound and that GARY WINKEL could pick up ten pounds of same immediately at 417 East 60 Street, New York County, apartment 12 thereat. Exhibit "G" also indicates that GARY WINKEL wants to take 20 pounds on credit and that he, GARY WINKEL, is using HOWARD ZACHARY FUCH'S name as a credit reference; that the transcribed conversation annexed as Exhibit "H" indicates that HOWARD ZACHARY FUCHS is, in fact, the "mutual friend Howie" referred to in Exhibit "G", that HOWARD ZACHARY FUCHS confirms 50 pounds of hashish are available to GARY WINKEL for \$775 per pound, that HOWARD ZACHARY FUCHS can do better on the price if the trans-

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action is on a cash and carry basis, that HOWARD ZACHARY FUCHS gives GARY WINKEL a phone number, 759-4453, where JOHN DOE NICK can be reached.

That a check of the records of the New York Telephone Company indicates that the subscriber for telephone instrument bearing numbers 679-0673 and 725-8634 are both registered to one ZACHARY FUCHS, and are both installed in apartment 17G of premises 305 E. 24 Street, New York County.

That a check of the records of the Con Edison Company indicates that the named utility subscriber for apartment 17G of premises 305 E. 24 Street, New York County, is and has been since October, 1971, one DESIREE J. COLLEN.

That your deponent is informed by a confidential informant, whose identity will be made known to the issuing Justice and whose information has led to seven arrests, all still pending, in the past, that the said c/i was, during the week of March 5, 1973, present in apartment 17G of premises 305 E. 24 Street, New York County; that also present were HOWARD ZACHARY FUCHS and a female named Susan; that the confidential informant saw a suit case filled with hashish in the said apartment; that while the confidential informant was present, JOHN DOE EDDIE, A/K/A EDDIE COHN, came to the premises and was given ten pounds of hashish by HOWARD ZACHARY FUCHS.

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That records of the Police Department of the City of New York indicate that a search warrant was executed on April 1, 1973, on premises 417 E.60 Street, New York County, apartment 12 thereat, and that quantities of marijuana, hashish, and cocaine, as well as narcotics paraphernalia were seized thereat. That seven persons, including NICHOLAS KYRANIOUS and ROBERT PLOSKERAD, were arrested at the said premises and charged with violations of the Narcotics Laws of the State of New York.

That HOWARD ZACHARY FUCHS has a common practice of registering in various hotels for a short period of time and then departing. That during the period July 27, 1973 through September 1, 1972, HOWARD ZACHARY FUCHS was registered at the Gramercy Park Hotel, 1 Lexington Avenue, New York County. That also present in the Gramercy Park Hotel during that period of time was one ROBERT RICHARDSON, A/K/A "B.T.", a known major narcotics violator from Atlanta, Georgia. That your deponent is informed by one Laura Fabian, switchboard operator at the Gramercy Park Hotel, that phone calls were made between the rooms of HOWARD ZACHARY FUCHS and ROBERT RICHARDSON during the above referenced time period. That during the same period of time, approximately 700 long distance and local telephone calls were logged from HOWARD ZACHARY FUCHS'S room. That investigation reveals that several of the phone numbers

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called by HOWARD ZACHARY FUCHS, as related above, were made to phones registered to persons known to agencies including the F.B.I., THE B.N.D.D., UNITED STATES CUSTOMS, THE R.C.N.P. and the New York City Police Department as major narcotic violators.

That from approximately April 1, 1973 to April 5, 1973, HOWARD ZACHARY FUCHS was registered in room 1212 of the Holiday Inn on West 57 Street, New York County. That pursuant to the Order annexed hereto as Exhibit "A", calls were intercepted between GARY WINKEL from 751-8608 to HOWARD ZACHARY FUCHS at room 1212 of the Holiday Inn, at least one of which referred to hashish (corn beef:..

That premises 305 E. 24th Street, New York County, is manned by 24 hour doorman service and has a closed circuit T.V. system.

That 24th Street is a one-way Eastbound street with alternate parking and tow away zone regulations. That legal parking, during the daytime or nighttime is extremely hard, if not impossible, to find and that any car parked illegally would undoubtably be noticed. That the neighborhood is such that anyone loitering in the area for any period of time would be obvious.

That commencing in September of 1972 efforts were made by your deponent and by brother officers assigned to the Bronx District Attorney's Office Squad to maintain surveillance and to obtain, by ordinary means of

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investigation, information concerning the possession, sale, transfer, importation of cocaine, hashish, and other dangerous drugs by HOWARD ZACHARY FUCHS. That some of these efforts are briefly outlined herein below.

That on September 13, 1972, and on September 22, 1972 your deponent placed one of the subject's residences at 60 Morrow Avenue, Scarsdale New York, under observation, but that the subject was not observed.

That on the 28th of Setpember, 1972, brother officers of your deponent proceeded to the subjects residence at 60 Morrow Avenue in order to photograph him. Such efforts were unsuccessful. On the 3rd of October, 1972, brother officers of your deponent examined the records maintained by various credit agencies on the subjects. The results disclose HOWARD ZACHARY FUCHS travels to California, Canada, and South America.

That on the 5th of October, 1972, brother officers of your deponent determined that the subject was employed by the Department of Social Services, City of New York as a case worker from June 1968 to July 1972, and that the subject had informed the Department of Social Services that his address was 2024 Paulding Avenue, Bronx, New York and his marital status was single. That on the 21st of November, 1972, your deponent determined that the subject was then employed by Water Brothers, 51 Allen Street, Buffalo, New York.

That both in December of 1972, and January of 1973,

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various confidential informants known to your deponent and registered with the Bronx District Attorney's Office and whose identities will be revealed to the Court upon request and who had personal knowledge of the subject and who had in the past engaged in narcotics trafficking with known associates of the subject were interviewed in an effort to locate the subject and to gain information concerning his narcotics dealings.

That surveillances have been made by known associates of the subject including Dana Michael Blasi FBI #682-232E., Terry Chess FBI #344-866H, Robert Richardson FBI #938958G.

That all of above attempts to determine when and where the subect would be in possession of large scale amounts of narcotic and dangerous drugs have proved unavailing and that your deponent has to date been unable to determine the identities and exact functions of those individuals who are believed to direct the narcotics importation scheme in which the subject is involved.

That your deponent believes from an examination of the pattern of activity of HOWARD ZACHARY FUCHS who has been a target of Case 366-72 for over six months and from the examination of the other targets including ROBERT RICHARDSON, MICHAEL ARLEN, and CHARLES LEVINE,

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BERNARD LASKY, and others, which examination includes a review of cases and investigations of other agencies including the Bureau of Customs, the Bureau of Narcotics and Dangerous Drugs, the Metro Squad of the Atlanta Police Department, and from the progress of this investigation that all normal means of surveillance have proved unsuccessful or have been exhausted and that it is only through the use of electronic monitoring devices as requested herein will dates, times and places of delivery of very large amounts of cocaine and cannabis from South America and elsewhere to the said HOWARD ZACHARY FUCHS, ROBERT RICHARDSON, JOHN DOE "EDDIE", and JOHN DOE GARRY be known, and further, that the true identities of the principals of this scheme and the full extent of the criminal participation of these principals including CHARLES LEVINE, BERNARD LASKY and others be known.

WHEREFORE, it is respectfully requested that Orders be issued authorizing and empowering the District Attorney of Bronx County or any of his duly authorized agents or any police officer acting under his direction to intercept telephonic communications being transmitted and received over telephone lines and instruments bearing numbers 725-8634 and 679-0673, to cut, break, tap, and make connection with such wires leading to and from the aforesaid telephone lines and instruments which may be found reasonable for that purpose, and to

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do all things necessary to permit communication transmitted over the said telephone lines and instruments to be intercepted for the purpose of obtaining evidence of violations of the narcotics laws of the State of New York (Article 220. P.L. and related sections) and conspiracy to commit same, as set forth above.

That no previous application has been made to any other Court, Judge or Justice for the Orders sought herein.

It is further respectfully requested that these Orders be made effective until and including the day of May, 1973.

DETECTIVE ABELARDO DELGADO

Sworn to before me this
____ day of April, 1973.

JUSTICE OF THE SUPREME COURT

Received ~~1~~ copies of the within
Appendix
this 22 day of March, 1974.

Sign _____

For: Edward J. Boyle V Esq(s).

Att'ys for Appellee

RECEIVED
MARCH 22 1974
CLERK'S OFFICE
COURT OF APPEALS
STATE OF NEW YORK

Edward J. Boyle V